A

SKY BLUE MEDIA SDN BHD v. GOH SIN TECK

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD FAIRUZ ZAINOL ABIDIN J
[CIVIL SUIT NO: WA-22NCVC-657-10-2018]
20 APRIL 2022

B

Abstract – *A contract may not be terminated for failure to perform what is legally impossible, especially when that impossibility is known by the terminating party. For example, if the termination of the contract is caused by a party's failure to obtain an approval of a local authority which is impossible to be obtained due to contravention with any legislation, and this is known by the terminating party, such termination would be held to be unlawful.*

C

D

CONTRACT: *Termination – Wrongful termination – Parties entered into billboard advertising agreement for erection of 60' x 60' LED billboard – Billboard with size of 60' x 40' erected, causing property owner to terminate agreement – Whether termination of agreement lawful – Whether erection of 60' x 60' billboard legally possible – Whether known by property owner – Whether property owner waived all rights to insist on 60' x 60' billboard – Whether the erection of 60' x 60' billboard approved by local authority – Whether there was misrepresentation at time of contracting – Whether there was specific timeline for completion of billboard erection in agreement – Whether force majeure clause of agreement applicable*

E

F

The plaintiff was a company involved in the provision of advertisement billboards, while the defendant was an individual who owned a property. The parties entered into a billboard advertising agreement ('agreement') wherein the plaintiff agreed to erect a 60' x 60' LED billboard on the property. However, instead of building the LED billboard with the size of 60' x 60', the plaintiff erected one with the size of 60' x 40'. This caused the defendant to terminate the agreement. After the LED billboard was brought down by the local authority, Kuala Lumpur City Hall ('DBKL'), the plaintiff commenced the present claim against the defendant, seeking, among others: (i) a declaration that the termination by the defendant was unlawful; (ii) an order of specific performance against the defendant; (iii) relevant damages; (iv) the return of the deposit of RM50,000; (v) reimbursement of RM1,092,652 being all the monies spent by the plaintiff to perform the obligations under the agreement; and (vi) costs. The defendant, on the other hand, counterclaimed against the plaintiff, for losses amounting to RM3,491,505.54 due to the plaintiff's continuous and wrongful occupation of the LED billboard's site. In this action, other than the main issue of whether the termination of the agreement was lawful, the other issues for determination were: (i) whether the erection of a 60' x 60' LED billboard was legally possible; (ii) whether the defendant knew that the plaintiff could only obtain approval for a 60' x 40' LED billboard; (iii) whether the

G

H

I

defendant had waived all of his right to insist on an erection of a 60' x 60' LED billboard; (iv) whether the defendant failed to establish the existence of an 'approval letter' by the DBKL for the erection of a 60' x 60' LED billboard; (v) whether there was a misrepresentation committed by the defendant that had induced the plaintiff to enter into the agreement; (vi) whether the termination of the agreement was premature owing to the fact that no definite timeline for the completion of the LED billboard had been breached by the plaintiff; and (vii) whether the *force majeure* clause under the agreement had been triggered.

Held (allowing plaintiff's claim; dismissing defendant's counterclaim):

(1) The evidence by PW1, a Licensing Department Officer from DBKL, and the valid license issued by DBKL, had established three crucial facts: (i) a 60' x 60' LED billboard was never legally possible due to DBKL's roofline restrictions, as per the Undang-undang Kecil Iklan (Wilayah Persekutuan) 1982; (ii) the defendant was aware of these restrictions, as evidenced from his conduct; and (iii) the only valid license ever issued for the site was for a 60' x 40' LED billboard. These findings had fundamentally undermined the defendant's purported ground for termination. (paras 10-14)

(2) When the agreement was signed, the defendant had only transferred to the plaintiff a 60' x 40' LED billboard license from his previous tenant. This transfer was documented in the defendant's own application to DBKL which explicitly referenced a 60' x 40' LED billboard license. The defendant knew that the plaintiff could only obtain an approval for a 60' x 40' structure. To renege on his acceptance that the structure to be built must be a 60' x 60' structure and terminating the agreement on such reasons reeked bad faith on the part of the defendant. The plaintiff's argument that the initial acceptance of the 60' x 40' LED billboard was deliberately done to provide the defendant the right to claim a breach of the agreement when the revenue was no longer at a level favourable to the defendant was accepted. (paras 16-18)

(3) The evidence revealed consistent conduct by the defendant which demonstrated unequivocal waiver. The defendant not only knew of the construction of the 60' x 40' LED billboard, but actively facilitated it. During the dismantling and the construction of the 60' x 40' LED billboard, the defendant would open up his property everyday for the plaintiff's staffs. The defendant also gave access to electricity and water to the staffs, and would often came by to check on the progress of the LED billboard. This involvement was confirmed and admitted by the defendant during cross-examination. For all intents and purposes, the defendant had acquiesced to the construction of the 60' x 40' LED billboard. (paras 20-22)

(4) The defendant had received two documented revenue payments from the plaintiff totalling RM317,255.70. By willingly accepting the revenue generated from the 60' x 40' LED billboard, the defendant had waived his right to insist on a 60' x 60' LED billboard. The acceptance of these payments also demonstrated the defendant's willingness to benefit from what he later claimed a breach of the agreement. After nine months of acquiescence and acceptance of benefits, only did the defendant attempted to terminate the agreement for non-compliance with the 60' x 60' requirement. This sudden invocation of rights previously waived through consistent conduct could not be sustained in law. The chronology of events compelllingly demonstrated that the defendant had made his election to accept the 60' x 40' LED billboard, and could not now resile from that position to justify the termination. This finding significantly undermined the defence to this action and supported the conclusion that the termination was wrongful. (paras 24-28, 30 & 35)

(5) The crux of the defendant's defence anchored on a purported DBKL approval for a 60' x 60' LED billboard. This came in a form of a DBKL 'kelulusan sementara' letter ('approval letter'). If the defendant was adamant that there was such an approval letter issued by DBKL, all efforts must be made by the defendant to prove the existence of such. It was incumbent on the defendant to call the relevant officer who issued the approval letter as the defendant had the evidential duty to do so. Although the plaintiff bore the legal burden of proving its claim, the defendant must also accept that the evidential burden would shift between the parties on the case presented to disprove the claim. As there was a failure by the defendant to prove the content of the approval letter, the contention that an approval was given by DBKL for a 60' x 60' structure was unsubstantiated. The defendant's version of events was therefore rejected, and the approval letter remained inadmissible. (paras 36, 39-40, 42 & 46)

(6) Even if there was a subsequent conditional approval obtained by the plaintiff for a 60' x 60' LED billboard, it did not negate the fact that the defendant had misrepresented his license status at the time of contracting. The defendant's argument that there was no express term requiring him to have an existing valid license failed to appreciate that implied terms could arise by operation of law. Terms may be implied if they were necessary to give business efficacy to the contract. Having a proper authorisation for the advertised billboard size was fundamental to the agreement's commercial purpose. Therefore, based on the documentary evidence and the demeanour of PW2, who was the person instrumental in dealing with the defendant, the defendant's misrepresentation regarding his license status was found to be material and had induced the plaintiff to enter into the agreement. The misrepresentation had vitiated the defendant's right to terminate the agreement. (paras 50 & 52-54)

(7) The agreement contained no specific timeline for erecting a 60' x 60' LED billboard or obtaining the requisite license. The plaintiff's interpretation was persuasive for two reasons: (i) based on industry practice, as evidenced by the defendant's previous tenants, showed considerable variation in timing between construction and licensing. This context suggested that the parties would have included explicit timelines if they intended strict temporal compliance; and (ii) the defendant's conduct in allowing the plaintiff to proceed with a 60' x 40' LED billboard for several months before termination indicated no mutual understanding of rigid timelines. Considering no definite timeline had been breached, the termination by the defendant was premature and unlawful. (paras 55-57 & 59)

(8) The following facts were persuasive: (i) the relevant guidelines and by-laws, which have the force of law, explicitly prohibits billboards exceeding the roofline height; (ii) the defendant himself had admitted during a meeting that DBKL would not allow billboards exceeding the roofline height; and (iii) the fact that previous tenants operated oversized billboards did not legitimise an illegal practice. Further, the plaintiff had proven facts that brought their case within the force majeure clause under the agreement – namely that compliance with the 60' x 60' requirement was legally impossible due to the binding DBKL regulations. The construction of the 60' x 40' LED billboard which was compliant with the DBKL guidelines did not constitute a breach of the agreement. The plaintiff's adherence to regulatory requirements was a reasonable response to force majeure circumstances rather than a breach justifying termination. (paras 67 & 69-70)

(9) As the agreement was unlawfully terminated, s. 74 of the Contracts Act 1950 had came into play. The plaintiff was granted the following reliefs: (i) the notice of termination by the defendant was declared as false and/or unlawful; (ii) the deposit of RM50,000 be returned to the plaintiff; (iii) RM1,072,995.79, being the costs of the LED billboard, be reimbursed to the plaintiff; and (iv) licensing and advertising fees amounting to RM21,168. The plaintiff was also granted costs of RM35,000. Whereas regarding the defendant's counterclaim, it must be dismissed as the purported loss flowed from the defendant's own breach of the agreement. (paras 71 & 72)

Case(s) referred to:

Balakrishnan Devaraj & Anor v. Admiral Cove Development Sdn Bhd [2010] 7 CLJ 152 CA ***(refd)***

Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd [1997] 1 CLJ 287 CA ***(refd)***

Fawziah Holdings Sdn Bhd v. Metramac Corporation Sdn Bhd & Another Appeal [2006] 1 CLJ 996 CA ***(refd)***

A *Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd [1987] 1 CLJ 123; [1987] CLJ (Rep) 102 SC* ***(refd)***
Intan Payong Sdn Bhd v. Goh Saw Chan Sdn Bhd [2004] CLJU 537; [2004] 1 LNS 537 HC ***(refd)***
Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC ***(refd)***
B *Malaysia Land Properties Sdn Bhd v. Tan Peng Foo [2013] 3 CLJ 663 CA* ***(refd)***
PM Securities Sdn Bhd v. Tan Hock Leong [2010] 6 CLJ 430 CA ***(refd)***
RHB Capital Bhd v. Carta Bintang [2012] CLJU 540; [2012] 1 LNS 540 HC ***(refd)***
Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 3 CLJ 503 FC ***(refd)***
Tan Kok Siang v. Kemuning Setia Sdn Bhd [2018] 8 CLJ 546; [2018] 4 ILR 209 CA ***(refd)***

C **Legislation referred to:**
Contracts Act 1950, ss. 40, 74

For the plaintiff - Harjinder Singh, Nirumala Pusudoray & Vimel Kaur; M/s Aziz Doray & Assoc
For the defendant - Loi Kwong Fon & Yap Boon Han; M/s Loi & Co

D *Reported by Syamim Ariffin*

JUDGMENT

Ahmad Fairuz Zainol Abidin J:

E **Introduction**

[1] This is a claim by the plaintiff, Sky Blue Media ('SBM') for an unlawful termination of billboard advertising agreement ('the agreement'). At the conclusion of the trial, I ruled that the defendant's termination of the
F agreement was unlawful and awarded damages to SBM. In so doing, I dismissed the defendant's counterclaim.

The Claim

[2] SBM, a company involved in the provision of advertisement billboards, entered into an agreement to build a 60' wide x 60' tall LED
G billboard (60' x 60' LED billboard) on a property purportedly belonging to the defendant, Goh Sin Teck ('Goh'). In return, a revenue sharing arrangement between the two parties was agreed on. A LED billboard for a size of 60' x 40' (60' x 40' LED billboard) was however constructed by SBM. The agreement signed on 19 September 2017 and a notice of
H termination by Goh issued on 28 August 2018. Goh then terminated the agreement for alleged breach by SBM as SBM failed to deliver a 60' x 60' LED billboard. The LED billboard was thereafter brought down by the local authority, Dewan Bandaraya Kuala Lumpur ('DBKL').

I

[3] SBM contended that the agreement was unlawfully terminated and sought the following reliefs:

(i) a declaration that the notice of termination by Goh dated 28 August 2018 is false and/or unlawful;

(ii) a declaration that the agreement remain valid and continuous;

(iii) an order for "specific performance" against Goh for the performance of the agreement and to do all such actions necessary to re-establish the billboard on the site until the date of the auto-renewed extension;

(iv) an order to prevent the Goh from taking possession and/or interfere with the commercial use and/or use of billboard on the site in any way until the completion of this action and/or as the court deems fit;

(v) damages due to the removal and destruction of the billboard be assessed and paid by Goh;

(vi) damages for the loss of revenue of the billboard be assessed and paid by Goh;

(vii) alternatively, the order that the deposit of RM50,000 be returned to SBM; and/or

(viii) reimbursement of RM1,092,652 and all monies spent by SBM to perform the obligations in the agreement.

(ix) general damages assessed by the court;

(x) further and/or alternatively indemnity for loss of revenue, goodwill assessed by the court;

(xi) further and/or alternatively damages for economic duress;

(xii) general damages or sums assessed by this court in respect of losses suffered by SBM as a result of the billboard's being removed and destroyed;

(xiii) costs;

(xiv) interest; and

(xv) such other further reliefs deemed appropriate and appropriate by the court.

[4] Goh filed a counterclaim alleging that he suffered losses amounting to RM3,491,505.54 due to SBM's continuous and wrongful occupation on the billboard site.

The Issue

[5] There were several issues listed by the parties as issues to be tried. However, I am of the view that the sole issue to be determined is:

A *Whether The Termination Of The Agreement By Goh Was Lawful*

Analysis

[6] It is my view that the termination of the agreement was unlawful. I say this for the reasons enumerated below.

B Licensing And Regulatory Compliance

[7] The question of licensing lies at the heart of this dispute. The evidence reveals a clear progression that demonstrates both the legal impossibility of a 60' x 60' LED billboard and Goh's knowledge of these constraints. DBKL only allowed a 60' x 40' structure.

C

[8] A key witness during the trial was a Licensing Department officer from DBKL, Kaza Karina Binti Mohd Khalid ('PW1'). She testified that she was responsible for the processing of all billboard licensing applications. She explained that the applicable guidelines were the Undang-Undang Kecil Iklan (Wilayah Persekutuan) 1982. In her carrying out her duties as the processing officer, she used the said guidelines as the base document. Anything that detracted from the said guidelines will not be recommended for approval.

D

[9] I find the evidence of the PW1 to be critical in determining the actual measurement allowed by DBKL. This was because PW1 was the person with authority to represent DBKL and unless discredited, I will be guided by what she testified.

E

[10] During SBM's case, Goh challenged PW1 on numerous aspects of her evidence. This included arguing that the guidelines referred by PW1 was not the applicable guidelines used by DBKL. I find PW1 to be consistent in her evidence and she did not waver in explaining the applicable guideline was the Undang-Undang Kecil Iklan (Wilayah Persekutuan) 1982. She was also firm in her testimony that DBKL will not approve a 60' x 60' LED billboard on the site applied for.

F

[11] Interestingly, PW1 was also listed as a witness for Goh. However, it was clear that if Goh went on to call PW1 as his witness, PW1 will not give favourable evidence for him. As such, PW1 remained as witness called by SBM. PW1 was the sole authoritative witness from DBKL and her evidence must be accepted as the position taken by DBKL when considering all advertising billboards.

G

[12] The final resolution of the licensing issue came on 7 September 2018, when DBKL issued a valid license for the 60' x 40' LED billboard, backdated to operate from 1 December 2017 to 30 November 2018. This backdating is significant as it validates the billboard's compliance with regulations from its initial construction.

H

I

[13] I find that the evidence establishes three crucial points. Firstly, a 60' x 60' LED billboard was never legally possible due to DBKL's roofline restrictions. Secondly, Goh was aware of these restrictions, as evidenced by his own conduct, and thirdly, the only valid license ever issued or possible for the site was for a 60' x 40' LED billboard.

[14] These findings fundamentally undermine Goh's purported grounds for termination. One cannot terminate a contract for failure to perform what was legally impossible, particularly when that impossibility was or should have been known to the terminating party.

Knowledge Of The Defendant

[15] In considering this issue, I find the transfer of the existing license for a 60' x 40' structure to SBM a relevant fact. It supports SBM's claim that Goh knew very well that the By Laws of DBKL only allowed 60' x 40' LED billboards. Despite this, Goh contracted with SBM for a 60' x 60' LED billboard to be erected.

[16] When the agreement was signed, Goh had transferred to SBM only a 60' x 40' LED billboard license from his previous tenant, moving walls. This transfer is documented in Goh's own application to DBKL which explicitly references a 60' x 40' (20.48 metre X 12.48 metre) LED billboard license.

[17] It is my finding that Goh at all material times knew that SBM could only obtain approval for a 60' x 40' structure. That was why Goh did not take exception at the initial stage. Therefore, to renege on his acceptance that the structure to be built must be a 60' x 60' structure and terminating the agreement on such reasons reeks bad faith on the part of Goh.

[18] I accept the argument of SBM that the initial acceptance of the 60' x 40' LED billboard was deliberately done to provide Goh the right to claim a breach of the agreement when the revenue was no longer at a level favourable to Goh.

Waiver And Acquiescence Of Contractual Rights By The Defendant

[19] SBM argued that Goh, through his conduct, had waived his right to insist on the construction of a 60' x 60' LED billboard and consequently, his right to terminate the agreement for this alleged breach. Based on the evidence and applicable law, I find that SBM has succeeded in establishing waiver on the part of Goh.

[20] The evidence reveals consistent conduct by Goh demonstrating unequivocal waiver. Goh not only knew of the 60' x 40' construction but actively facilitated it.

[21] It was SBM's evidence that "during the dismantling of the 60' x 40' static billboard and the construction of the 60' x 40' LED billboard, Goh would open up the building every day for our contractors, electrician, engineer, staff and *etc* ('contractors'). The TNB Meter and wiring for the 60' x 40' LED billboard was placed in the building. GOH gave access to electricity and water to the contractors, and would often come by to check the progress of the LED billboard."

[22] Goh confirmed this involvement under cross-examination when he admitted that he gave access to SBM for the construction works to be carried out. Goh cannot now say that he was never following up on the construction of the 60' x 40' billboard. He was closely monitoring the construction. For all intents and purposes, he acquiesced to the construction of the 60' x 40' billboard size all along.

Chronology And Conduct Demonstrating Waiver

[23] The timeline of events powerfully demonstrates Goh's waiver of any right to insist on a 60' x 60' LED billboard. The evidence reveals the following sequence:

> In December 2017, SBM erected the 60' x 40' LED billboard with Goh's full knowledge and active cooperation. Throughout the next nine (9) months, Goh not only allowed the continued operation of the 60' x 40' LED billboard but accepted revenue payments generated from it.

[24] Based on the evidence, Goh received two documented revenue payments from SBM totalling RM317,255.70.

[25] This is corroborated by Goh's own "466 notice" dated 28 December 2021 to SBM, where Goh acknowledged receiving sales reports until 28 February 2019 and claimed a total entitlement of RM317,255.70. The acknowledgement is as follows:

> Pursuant to your Sales Report for Bukit Bintang Digital LED Screen as at 28 February 2019, which is furnished to our client, you have acknowledged, and informed our Client, that our Client's Entitlement.

[26] The acceptance of these payments further supports SBM's argument that Goh had waived his right to insist on a 60' x 60' LED billboard, as he willingly accepted revenue generated from the 60' x 40' LED billboard over an extended period.

[27] Goh's acceptance of these payments is also significant as it demonstrates his willingness to benefit from what he later claimed was a breach of the agreement.

[28] It was only on 28 August 2018, after nine months of acquiescence and acceptance of benefits, that Goh attempted to terminate the agreement for non-compliance with the 60' x 60' requirement. This sudden invocation of rights previously waived through consistent conduct cannot be sustained in law.

[29] Section 40 of the Contracts Act 1950 is particularly relevant here, as it provides that a party loses the right to terminate where they have "signified, by words or conduct, (their) acquiescence in its continuance." Goh's conduct over these nine months – providing access, accepting revenue, and allowing continued operation – constitutes clear acquiescence under the statute.

[30] The extended period of knowing acceptance, coupled with the receipt of financial benefits, creates an insurmountable barrier to Goh's belated attempt to assert rights he had clearly waived through his conduct. This chronology of events compellingly demonstrates that Goh had made his election to accept the 60' x 40' LED billboard, and cannot now resile from that position to justify termination.

[31] The Court of Appeal in *PM Securities Sdn Bhd v. Tan Hock Leong* [2010] 6 CLJ 430 addressed similar circumstances, holding that acceptance of alternative performance demonstrates waiver. Here, Goh's acceptance of revenue from the 60' x 40' LED billboard clearly indicated waiver of the original dimensional requirement.

[32] Furthermore, as held in *Fawziah Holdings Sdn Bhd v. Metramac Corporation Sdn Bhd & Another Appeal* [2006] 1 CLJ 996; [2006] 1 MLJ 505, a party cannot approbate and reprobate – having chosen one course of conduct, they cannot later resile from it. Goh's sustained acceptance of the 60' x 40' LED billboard's construction and operation constitutes precisely such an election.

[33] The timeline therefore is particularly telling. Goh allowed construction in December 2017, accepted revenue payments for nine months, and only then attempted termination in August 2018.

[34] I therefore find that Goh unequivocally waived his right to insist on a 60' x 60' LED billboard. His subsequent attempt to terminate the agreement for this alleged breach cannot stand. The doctrine of waiver exists precisely to prevent such opportunistic behaviour where a party acquiesces to a variation only to later assert it as grounds for termination.

[35] This finding significantly undermines the defence to this action and supports the conclusion that the termination was wrongful.

Failure To Establish The Existence Of DBKL 'Approval Letter' For A 60' x 60' LED Billboard

[36] The fact that PW1 was the sole DBKL witness has a significant consequence to Goh's case. This is because the crux of Goh's defence anchored on a purported DBKL approval for a 60' x 60' LED billboard. This came in the form of a DBKL "kelulusan sementara" letter dated 21 April 2018.

[37] Goh insisted that the letter contained the approval given by DBKL and that SBM was to act on the said approval within the 30 day timeline stated in the said letter.

[38] During a "without prejudice" meeting on 11 July 2018 between the parties in their attempt to resolve the impasse, Goh showed the said letter to SBM. SBM, however, contended that they did not receive the said letter. SBM claimed it was only at that meeting that they came to know about the said letter.

[39] It is my considered view that if Goh was adamant that there was such a letter issued by DBKL, all efforts must be made by Goh to prove the existence of the said letter. It was incumbent on Goh to call the relevant officer who issued the said letter as Goh had the evidential duty to do so.

[40] SBM bears the legal burden of proving its claim. However, Goh must also accept that the evidential burden shifts between the parties on the case presented to disprove the claim.

[41] It is trite that whilst the legal burden remains with SBM, the evidential burden will shift once SBM has put sufficient evidence before the court which requires rebuttal from Goh. The Federal Court in *Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418; [2017] 4 MLJ 697 held:

> [52] The 'burden of proof' in s. 101 is the burden to establish a case which rests throughout on the party who asserts the affirmative of the issue. The 'burden of proof' in s 102 is the burden to adduce evidence, to make out or rebut the claim. The 'burden of proof' in s. 102 shifts from one side to the other according to the weight of the evidence. To differentiate the sense used, the 'burden of proof' in s. 101 is 'burden of proof', while the 'burden of proof' in ss. 102 and 103 is dubbed 'onus of proof'. In some jurisdictions, the s. 101 'burden of proof' is labelled 'legal burden' while the s. 102 burden of proof' is referred to as 'evidential burden'.
>
> ...
>
> [55] But 'when (the SBM) gives such evidence as will support a *prima facie* case, the onus shifts on to the defendant, to adduce rebutting evidence to meet the case made out by the SBM. As the case continues to develop, the onus may shift back again to the SBM ...

[42] As there was a failure by Goh to prove the content of the said letter, I find the contention that an approval was given by DBKL for a 60' x 60' structure to be unsubstantiated.

[43] Even if it was only obtained by Goh much later, it was critical for Goh to call a DBKL representative to confirm the issuance of the said letter. This was because PW1 had yet to assume her current position in 2018.

[44] This was the best chance for Goh to demonstrate to this court that an approval had been given by DBKL but SBM failed to take the necessary action. This was therefore an opportunity lost by Goh.

[45] It is my view that the unproven "kelulusan sementara" letter by DBKL was raised purely as an excuse to justify the termination of the agreement.

[46] The said approval letter was nothing but an unsubstantiated claim which is based on an unproven letter. I, therefore, reject Goh's version of events. The disputed letter remains inadmissible and is disregarded.

Misrepresentation

[47] SBM alleged misrepresentation against Goh based on two main grounds. Firstly, Goh showed SBM his old license from 2010 (issued before DBKL guidelines) which permitted a cumulative 65' x 60' LED billboard ("Goh's old license") to induce SBM to enter the agreement. This was confirmed during Goh's cross-examination.

> NP: I put it to you, before the parties, meaning Sky Blue and Goh Sin Teck enter into the agreement, ok, you gave this license to Sky Blue to show that you have 60 x 60 license for the billboard, agree with that statement?
>
> Goh: Yes.

[48] Secondly, in reality, at the time of the agreement, Goh only had a 60' x 40' license through his previous tenant moving walls. This is evidenced by Goh's own application to transfer moving walls's 60' x 40' license to SBM.

[49] The law on misrepresentation has been documented in many cases. It is settled law that a misrepresentation must be a false statement of existing fact which is normally made prior to, or during the preliminary stages of a contract and is made with the intention of and has the effect of inducing the party to whom it is made (representee) to enter into the contract with the representor (see the Court of Appeal decision in *Balakrishnan Devaraj & Anor v. Admiral Cove Development Sdn Bhd* [2010] 7 CLJ 152).

[50] Goh's defence that the misrepresentation is irrelevant because SBM later obtained conditional approval for a 60' x 60' LED billboard is against my finding. Even if there was a subsequent conditional approval, it does not negate the fact that Goh misrepresented his license status at the time of contracting.

[51] It is the law that if a party loses their right to terminate if guilty of wrongdoing, to permit the blameable party to do either would be to permit him to take advantage of his own wrong to put an end to the contract.

A (See *Tan Kok Siang v. Kemuning Setia Sdn Bhd* [2018] 8 CLJ 546; [2018] 4 ILR 209 and *Gimstern Corp (M) Sdn Bhd & Anor v. Global Insurance Co Sdn Bhd* [1987] 1 CLJ 123; [1987] CLJ (Rep) 102).

[52] Goh's argument that there was no express term requiring him to have an existing valid license fails to appreciate that implied terms can arise by B operation of law. As held in *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503, terms may be implied if they are necessary to give business efficacy to the contract. I find that having proper authorisation for the advertised billboard size was fundamental to the agreement's commercial purpose.

C **[53]** Therefore, on the facts and upon evaluating the documentary evidence and the demeanour of SBM's main witness, Dato' Manikandamurthy Velayoudam ('PW2'), who was the person instrumental in dealing with Goh, I find that Goh's misrepresentation regarding his license status was material and had induced SBM to enter into the agreement.

D **[54]** This misrepresentation vitiates Goh's right to terminate the agreement based on SBM's alleged breaches. Goh cannot be permitted to profit from his own wrongdoing.

Timeline For Performance

E **[55]** The agreement contained no specific timeline for erecting the 60' x 60' LED billboard or obtaining the requisite license. Clause 4.1 merely stated SBM "shall acquire LED Billboard with a display size of 60ft x 60ft" while cl. 4.3 required SBM to "obtain license ... from DBKL" without stipulating when these obligations must be fulfilled.

F **[56]** I find the SBM's interpretation persuasive for two reasons. Firstly, based on industry practice, as evidenced by Goh's previous tenants, showed considerable variation in timing between construction and licensing. Seni Jaya took two years and nine months to obtain its license, while Moving Walls required 11 months. This context suggests parties would have included G explicit timelines if they intended strict temporal compliance.

[57] Secondly, Goh's conduct in allowing SBM to proceed with the 60' x 40' LED billboard for several months before termination indicates no mutual understanding of rigid timelines.

H **[58]** On this issue, I find the Court of Appeal decision in *Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd* [1997] 1 CLJ 287 instructive as it underlined the point that terminating a contract based on breach of a non-fundamental term is itself a breach.

I **[59]** I therefore find Goh's termination on 28 August 2018 premature and unlawful, as no definite timeline had been breached. This aligns with the principle that ambiguity in commercial contracts should be construed against the party seeking to enforce strict compliance, particularly where such enforcement would result in forfeiture.

[60] I also accept the argument of SBM that this gave them the opportunity to try and negotiate with DBKL to obtain the 60' x 60' LED billboard approval. The termination was therefore premature.

Force Majeure And Impossibility Of Performance

[61] *Force majeure* clauses are clauses generally intended to include risks beyond the reasonable contract of a party. In essence, it frees both parties from liability or obligation when an event such as war, riot or act of God such as an earthquake takes place (see *RHB Capital Bhd v. Carta Bintang* [2012] CLJU 540; [2012] 1 LNS 540; [2012] 10 MLJ).

[62] SBM argues that the *force majeure* clause in cl. 9.1 of the agreement was triggered because it was legally impossible to construct a 60' x 60' LED billboard due to DBKL guidelines. The clause states:

> A party shall not be in breach of this agreement if there is any total or partial failure of performance by it of its duties under this agreement which is occasioned by ... any ... reason **beyond the control of that party**. (emphasis added)

[63] In *Intan Payong Sdn Bhd v. Goh Saw Chan Sdn Bhd* [2004] CLJU 537; [2004] 1 LNS 537, it was held that "a party relying upon a force majeure clause must prove the facts bringing the case within the clause." This principle was affirmed in *Malaysia Land Properties Sdn Bhd v. Tan Peng Foo* [2013] 3 CLJ 663.

[64] It is my firm view that SBM has succeeded in bringing the facts of the case within cl. 9.1 of the agreement.

[65] I find that SBM has successfully established that the approval for a 60' x 60' LED billboard was beyond its control. This effectively kicks in the operation of cl. 9.1 of the *force majeure* clause in the agreement.

[66] SBM demonstrated that DBKL guidelines prohibited billboards exceeding roofline height, making a 60' x 60' LED billboard legally impossible. This was corroborated by DBKL's licensing officer PW1's testimony that such billboards were "tidak dibenarkan" (not permitted).

[67] Further, the following facts are persuasive:

(i) DBKL's guidelines, which have force of law when read with the Advertisement By-Laws, explicitly prohibit billboards exceeding roofline height;

(ii) Goh himself admitted during 11 July 2018 meeting that "the Bandaraya (DBKL) will not allow" billboards exceeding the roofline; and

(iii) the fact that previous tenants operated oversized billboards does not legitimise an illegal practice.

[68] Goh countered that *force majeure* does not apply because DBKL granted conditional approval for a 60' x 60' LED billboard on 21 April 2018. Again, this is contrary to my earlier finding. It was also argued that the guidelines only applied to business premise signboards, not commercial billboards. In addition, Goh contended that the previous tenants had operated 60' x 60' LED billboards. However, this is not supported by any evidence.

[69] Applying *Intan Payong*, SBM has proven facts bringing their case within the *force majeure* clause – namely that compliance with the 60' x 60' requirement was legally impossible due to binding DBKL regulations beyond their control. I therefore find that SBM's construction of a 60' x 40' LED billboard compliant with DBKL guidelines did not constitute a breach of the agreement.

[70] This finding is consistent with the principle that contracts should not be construed to require performance of illegal acts. SBM's adherence to regulatory requirements was a reasonable response to *force majeure* circumstances rather than a breach justifying termination.

Conclusion

[71] As I had rule that the agreement was unlawfully terminated, it is trite that s. 74 of the Contracts Act comes into play. As such, I allow the following reliefs to be awarded:

(i) prayer (a) of the re-amended statement of claim, *ie*, a declaration that the notice of termination by Goh dated 28 August 2018 is false and/or unlawful;

(ii) alternative prayer (g), *ie*, deposit of RM50,000 be returned to SBM pursuant to prayer 3.1 of the agreement;

(iii) prayer (h) *ie*, reimbursement amended to RM1,072,995.79 being costs of the LED billboard structure consistent with the witness statement of PW2 and documents produced in bundle B1; and

(iv) licensing and advertising fees amounting to RM21,168.

SBM was also awarded costs of RM35,000.

Counterclaim

[72] Goh's counterclaim for RM3,491,505.54 for alleged loss of opportunity must be dismissed on the fundamental reason that the purported losses flowed from Goh's own breach.

[73] Having determined that the termination of the agreement was unlawful, it is axiomatic that any losses flowing from his own breach cannot be allowed. The position in law is firm on this point. To rule otherwise would permit the wrongdoer to take advantage of his own wrongdoing by profiting on something that he was never entitled to from the onset.

[74] I am guided by the decision of the Court of Appeal in *Tan Kok Siang v. Kemuning Setia Sdn Bhd* [2018] 8 CLJ 546; [2018] 4 ILR 209 which held:

> [23] Further, the right to terminate may be lost where the party terminating the contract is in fact guilty of some wrongdoing ... because to permit the blameable party to do either would be to permit him to take advantage of his own wrong to put an end to the contract.

[75] Similarly, the Court of Appeal in *Ching Yik Development Sdn Bhd v. Setapak Heights Developments Sdn Bhd* [1997] 1 CLJ 287 established:

> A party who terminates a contract or treats it as having come to an end in reliance upon the breach of a non-fundamental term is himself guilty of a breach of contract.

It is my finding that Goh is not entitled to any loss of profits.

[76] In the foregoing, the counterclaim is dismissed.